CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3444

Heard in Montreal, Tuesday, 14 September 2004

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

EX PARTE

DISPUTE:

Policy grievance under the provisions of collective agreements 4.16, 4.2 and 4.3 alleging violations of, *inter alia*, the noted collective agreements resulting from the Company's unilateral implementation of an Attendance Management Policy.

UNION'S STATEMENT OF ISSUE:

Although not limited thereto, the Union submits that the Company (with respect to the Attendance Management Policy) is in violation of the, *inter alia*, collective agreements, jointly and severally, as follows: **1.)** Violation of Article 51 of agreement 4.16. **2.)** Violation of Article 85 of agreement 4.16. **3.)** Violation of Article 82 of agreement 4.16. **4.)** Harassment and intimidation of employees contrary to the *Canada Labour Code* and the collective agreements 4.16 and/or 4.3 and/or 4.2. **5.)** Violation of the "duty of care" in introducing policies/positions with respect to employment rights and responsibilities. **6.)** The Company policy was discriminatory "on its face" this given the real likelihood of discipline. This in the view of the Union meets the definition of "a negative employment consequence". This in application of the *Code*.

The Union requests the Company cease and desist violating, *inter alia*, the collective agreements and to comply with, *inter alia*, the collective agreements.

The Company denies that it has violated, *inter alia*, the collective agreements and therefore declined the Union's request.

The Company denies that it has violated, *inter alia*, the collective agreements and therefore declined the Union's request.

FOR THE UNION:

(SGD.) R. A. BEATTY
GENERAL CHAIRPERSON

There appeared on behalf of the Company:

A. Giroux	– Counsel, Montreal
B. Hogan	– Manager, Labour Relations, Toronto
A. MacNab	– Manager, Labour Relations, Montreal
K. Tobin	– Counsel, Montreal

And on behalf of the Union:

M. Church	– Counsel, Toronto
R. A. Beatty	– General Chairman, Sault Ste. Marie
R. LeBel	– General Chairman, Quebec
R. Hackl	– Vice-General Chairperson, Edmonton
G. Anderson	– Vice-General Chairperson,
A. McDavid	– L.C., Capreol
T. Beatty	– Local Chairperson, Belleville
C. Little	– Vice L.C., Belleville
S. Pommet	– L.C., Montreal

AWARD OF THE ARBITRATOR

For the purposes of clarity the Arbitrator confirms that the grievance before me properly extends to collective agreements 4.16, 4.2 and 4.3, as reflected the Union's statement of issue. Any reference to the provisions of collective agreement 4.16 shall be deemed to apply to the similar provisions of collective agreements 4.2 and 4.3.

I am satisfied that the real issue presented is whether the Company's Attendance Management Policy violates the provisions of the three respective collective agreements cited in the Union's statement of issue. I do not find, on the basis of the material before me, any basis to conclude that there has been harassment or

intimidation of employees in a manner which would violate the **Canada Labour Code** or the collective agreements, nor do I deem it appropriate to make any comment on the relatively unexplained "duty of care" cited in the statement of issue. The same conclusion is to be drawn as regards the allegation of the Company's policy being discriminatory. Nor does the Arbitrator deem it fruitful, or indeed helpful, to review the broader allegations of the Union concerning what it characterizes as general changes in the management direction of the Company. The purpose of arbitration under the **Canada Labour Code** is not to give arbitrators the powers of a Royal Commission into broader labour-management issues, but rather to provide an expedited form of resolution for clearly identified violations of specific terms of a valid collective agreement.

The first fact situation arising from the grievance is the effort of the Company to enforce employee attendance over the Christmas period of 2003. In that regard the Union draws to the Arbitrator's attention the example of the following communication to all employees in the Champlain District made by the Company on December 20, 2003.

> Office of the Operations Manager CANADIAN NATIONAL RAILWAYS
>
> CHAMPLAIN DISTRICT December 20th 2003
>
> There has been an increase in "Missed Calls" and "Booking Sick" over the holiday season. CN is not shutting down of the New Year period, in order to protect our customer's interest. EVERY employee will be expected to protect their assignment over this period and no one will be allowed to "book sick" unless they return back to work with a Dr's note for the day "booked sick". The note is to be presented to the GST at "A" Tower the same day returned back to work. Any employees without a valid Dr's note will be considered as not protecting their commitment as an employee of CN, failing to meet our customers commitment, and will be further investigated accordingly.

"NO MISSEDCALLS" will be tolerated. [sic]

The Union submits that the foregoing communication is a clear violation of article 53.2 of collective agreement 4.16 which provides as follows:

> **53.2** Employees, on resuming duty after sick leave, will not be required to produce a doctor's certificate except employees who are considered continual offenders book sick when called or while on duty after being called may be required to produce a medical certificate within 48 hours of resuming duty and/or submit to an examination from a Company medical officer. Payment for taking such required examination will not accrue to employees governed by the provisions of this paragraph.
>
> **NOTE:** The 48-hour requirement in paragraph 53.2 will exclude weekends and general holidays.

The Arbitrator is satisfied that it is impossible to reconcile the above directive of Superintendent Michael Farkouh, and Supervisors Claude Richer, Guy Belanger and Rick Baker with the legal undertakings of the Company as reflected in article 53.2 of collective agreement 4.16. That article plainly indicates that the parties, in bargaining under the **Canada Labour Code**, have expressly addressed the issue of when and how the Company might require an employee who has booked sick to provide a medical certificate. Such certificates are plainly not to be required on an automatic basis of every employee, as decreed in the notice of December 20, 2003, nor does the intent of the collective agreement allow the Company to treat an employee who books sick during the holiday period as "not protecting their commitment as an employee of CN", notwithstanding the obvious opinion to the contrary of the named supervisors. Unfortunately, as the record would indicate, the communication of December 20, 2003 appears to have been promulgated in knowing disregard of or indifference to the

Company's own legal obligations under the terms of the collective agreement, and of its obligations and undertakings to its employees lawfully negotiated with their bargaining agent.

A second aspect of the grievance arises out of the Company's adoption of new attendance management guidelines, as communicated, for example, to the employees of the Champlain District on January 9, 2004. On that date a notice from Superintendent Michael Farkouh was issued, in a manner consistent with other similar notices elsewhere in Canada, in the following terms:

> Office of the Operations Manager CANADIAN NATIONAL RAILWAYS
>
> CHAMPLAIN DISTRICT JANUARY 9, 2004
>
> The Company expects each employee to maintain their attendance record to an acceptable standard which requires employees to make their miles each month, protect assignments as bulletines [sic] or protect spareboards and pools by following turns in order. Employees must not absent themselves from their usual calling place [sic] without notifying the employee (Crew Management) required to call them so alternate arrangements can be made.
>
> Unauthorized time off of work can create late and unfilled assignments or positions resulting in terminal delay, issued customer commitements [sic] and creates difficulty when regulating working boards. When employees miss work their unexpected absence impacts those employees who are required to be called in their place as well as other employees on the working board.
>
> Employee attendance will be monitored and intervention may occur when any of the following irregularities occur:
>
> - Missing a call
> - Refusing a call
> - Booking sick or unfit on call or after accepting a call
> - After call time of assignement [sic]
> - After start time of assignement [sic]
> - Not reporting for or reporting late for duty
> - Exhibiting a pattern for failing to protect work, such as (but not limited to) specific days, times or destinations
> - Unauthorized Absence (AWOL)

> The respective collective agreements are interpreted to allow employees to be judge of their own condition and to book sick or unfit only when suffering from bona fide illness. In accordance with Part II of the Canadian Labour Code, the Company may require an employee to produce a doctor's certificate at any time an employee has booked sick.
>
> EMPLOYEES' ATTENDANCE WILL BE MONITORED AND INTERVENTION MAY OCCUR SHOULD THE EMPLOYEE ABSENT THEMSELVES FROM WORK DUE TO ILLNESS MORE THAN ONCE IN A 28 DAY PERIOD.
>
> Should it be necessary for an employee to be unavailable for work temporarily it is the employee's responsibility to make the necessary arrangements in advance.
>
> Michael Farkouh – Superintendent

It does not appear disputed that in the above communication the term "intervention" means the possibility of a Company investigation, the first step towards the assessment of discipline. With respect to the content of the communication, counsel for the Union correctly points out that there is no provision in Part II of the **Canada Labour Code** (misnamed the Canadian Labour Code) which governs the Company's ability to require an employee to produce a doctor's certificate. There are, of course, provisions under Part III of the **Canada Labour Code** which do, in specific circumstances, allow an employer to make a written request for a medical certificate, in accordance with appropriate notice requirements. However, the Arbitrator cannot find that the Company's misrepresentation of the contents of the **Canada Labour Code**, whether by error or by design, is itself a violation of any provision of the collective agreement. As related above, however, the Company is, in any event, bound by the provisions of article 53.2 of collective agreement 4.16, and any similar provisions of collective agreements 4.2 and 4.3, as regards the ability to demand a medical certificate in the circumstances therein described.

Counsel for the Union notes to the attention of the Arbitrator that the collective agreement contains a number of provisions which deal with attendance and time keeping issues. Notably, article 2.12(a)(b)(c) of collective agreement 4.16 contemplates the reduction of employee guarantees when employees are not available for duty or miss calls. With respect to yard service, article 3.4(b) similarly provides the possibility of a reduction of guarantees in the event an employee is not available for his or her assignment of misses a call. Similar provisions are found in article 3.5 of agreement 4.16, and it appears that these articles have their equivalents in collective agreements 4.2 and 4.3. Reference is also made to the provisions whereby allowance is made for the adjustment of spareboards, pools and furlough boards.

Counsel for the Union submits that the Company's new attendance management policy effectively involves a reinterpretation of the provisions of the collective agreement undertaken without consultation with the Union, contrary to article 85 of the collective agreement. The Arbitrator has some difficulty with that submission. There is nothing on the face of the communication of the Company's notice of January 9, 2004 issued on the Champlain District, for example, which can be characterized as being in violation of or inconsistent with any provision of the collective agreement. At its strongest, what that document states is that where an employee has, for example, missed a call or refused a call, the situation will be monitored and the Company may decide to intervene by convening a disciplinary investigation. On its face that is not inconsistent with the prerogatives of the employer to manage its enterprise by considering, in any given

situation, whether it wishes to conduct a disciplinary investigation and, based on the results of the investigation, to assess discipline. The fact that the collective agreement has built in financial penalties for failures to respond to calls to duty does not implicitly mean that employees are thereby sheltered from the possibility of discipline. The loss or reduction of wages for absence from work is standard in all industries. The decisions of this Office have repeatedly confirmed the fact that missed calls can, in appropriate circumstances, result in severe discipline, up to and including discharge. This Office has also acknowledged the prerogative of an employer to enforce attendance through the implementation of a more strict attendance management policy. (See, e.g., **CROA 3190, 3381** and **3439**.)

The Arbitrator agrees that it is not open to the Company to engage in the harassment of employees by the abusive application of the strict provisions of the collective agreement. It is well established that collective agreements are deemed to have implied terms whereby they are to be interpreted and applied reasonably by both parties. If, for example, it could be shown that the Company dealt with an employee of twenty-five years' service with no prior record of any missed call by summoning that employee to a disciplinary investigation on the strength of a single missed call, it might well be argued that the very act of investigation amounts to an abuse of the Company's prerogatives under the provisions of the collective agreement. Such a determination, however, cannot be made in a general fashion through a policy grievance which deals only with selective examples. The merits of such an allegation would have to be determined on a case by case basis, through the normal grievance and arbitration

process. To be sure, any record of such abuse would obviously give substance to a remedy grievance subsequently brought by the Union under the provisions of article 85 and Addendum 123 of the collective agreement. That scenario is, however, plainly beyond the scope of this grievance.

With respect to the substance of the policy as reflected in the notice of January 9, 2004, therefore, the Arbitrator can find no violation of the collective agreement on the face of that document. Clearly it would be open to the Company to invoke intervention in the form of a disciplinary investigation in any of the described circumstances where the record of the employee would justify such action. Within that context the use of the word "may" with respect to the possibility of Company intervention is not inappropriate. In the result, the Arbitrator must find that the statement of the policy, on its face, does not disclose any violation of the collective agreement. Nor, on the material presented, is the Arbitrator prepared to conclude that there has been a pattern of abuse or harassment of the employees, contrary to the **Canada Labour Code**. That is particularly so in the absence of any reference to the provisions of the **Code** within the Union's brief presented to the Arbitrator at the hearing. While it is arguable that the assessment of discipline for an employee who absents himself on *bona fide* sick leave would be in violation of s. 239 of the **Canada Labour Code**, Part III, no specific example of any such discipline has been put forward for adjudication in this grievance and, as noted, counsel for the Union has given no substance to any alleged prohibition against harassment and intimidation of employees in respect of attendance policies to be found in the **Canada Labour Code**.

For all of the foregoing reasons the grievance is allowed, in part. The Arbitrator finds and declares that the communication issued over the signature of Superintendent Michael Farkouh and Supervisors Richer, Belanger and Baker dated December 20, 2003, is in clear violation of the terms of the collective agreement and the Arbitrator so declares. The Company is directed to refrain from the publication of any notice which would be contrary to the terms of article 53.2 of the collective agreement.

The Arbitrator cannot find however, that there is any violation of the collective agreement disclosed in the notice of the attendance management policy that is exemplified in the communication in the Champlain District on January 9, 2004. I am satisfied that that communication is consistent with the standards of the **KVP** award and does not constitute a violation of the freeze provisions of the **Canada Labour Code**, since the Company did not purport to alter the rights and privileges of the employees or the Union by its policy.

The Arbitrator retains jurisdiction in the event of any dispute concerning the interpretation or implementation of this award.

September 20, 2004

(sgd.) MICHEL G. PICHER
ARBITRATOR